that carries the inherent risk of undermining First Amendment interests." 114 S. Ct. at 2468. The fact that the regulations apply only to cable systems does not make them especially suspect. As economic measures that may incidentally affect speech, the rate regulations must be analyzed by the same "intermediate" standard the Supreme Court applied in *Turner Broadcasting.* That is, the government's interest must be important or substantial and the means chosen to promote that interest must not substantially burden more speech than necessary to achieve the government's aims, *id.* at 2469, or as the Supreme Court phrased it in an earlier decision, the regulations must "promote[ ] a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini,* 472 U.S. 675, 689 (1985). As we next discuss, the regulations satisfy this standard.

III

The government's interest in regulating cable rates is evident—protecting consumers from monopoly prices charged by cable operators who do not face effective competition. One need look no further than *Turner Broadcasting* to determine that this interest is to be treated as "important or substantial": "the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." 114 S. Ct. at 2470. Congress had before it evidence showing that "the cable television industry has become a dominant nationwide video medium." 1992 Cable Act, Pub. L. No. 102–385, § 2(a)(3), 106 Stat. 1460. Cable systems serve 60 percent of American households, yet only a small percentage of the approximately 11,000 cable operators in the country face competition from other cable service providers. *Id.* § 2(a)(2); Rate Order ¶ 15 n.30. After the Cable Communications Policy Act of 1984, Pub. L. No. 98–549, § 623, 98 Stat. 2779, 2788–89, deregulated the industry, the "average monthly cable rate . . . increased almost 3 times as much as the Consumer Price Index." 1992 Cable Act, § 2(a)(1). Congress found that "[w]ithout the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers." *Id.* § 2(a)(2).

Although cable petitioners "doubt the asserted premise of *pervasive* monopoly pricing," Cable Petitioners Rate Brief at 50, Government Accounting Office studies sufficiently support it. An August 1989 General Accounting Office survey revealed an average cable "rate increase of over 25% in about 2 years." S. REP. No. 138, 102d Cong., 1st Sess. 5 (1991). The survey, some believed, may have underestimated the rate increases because: "(1) the systems with large increases did not respond to the survey; and (2) the systems with no significant increases not only responded in great number but also many of these systems may have received increases from the franchising authority prior to deregulation." *Id.* The cable petitioners think that only per-channel rate increases should be considered: since channel offerings increased from 24 to 30 while rates increased by 29 percent, there had been only a 3.2 percent per-channel rate increase, significantly lower than the Consumer Price Index. But per-channel figures are misleading because, the Commission found, "economies of scale . . . arise as operators add channels to their systems." Second Reconsideration ¶ 40. As a cable operator adds more channels (most did in the 1980s), the operator's fixed costs are spread over additional channels and its per-channel fixed costs decline. Cable operators estimated their fixed costs at $20 per month per subscriber for basic service. *Id.* ¶ 189. Absent evidence that the marginal cost of channels added during the 1980s was unusually high, the fact that per-channel rates increased at all is thus not helpful to the cable petitioners' cause.

Since the government's interest is substantial, the remaining question deals with the manner in which the rate regulations seek to promote that interest.[10] Do the regulations

[10] Congress defined "effective competition" to include situations in which "fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system," 47 U.S.C.

"burden substantially more speech than is necessary"? *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). We shall assume that rules requiring cable operators to charge reasonable rates burden speech, although it is by no means clear how they do so.[11] Still, the rate regulations are narrow enough: rate regulation is triggered by the absence of effective competition and ceases when effective competition emerges. The Commission points out that it has taken steps designed to ensure that cable rate regulation will be of limited duration. As the cable petitioners recognize, "the

§ 543(*l*)(1). Such "low penetration systems" are therefore not subject to rate regulation even though, as the Commission found, their rates "are not statistically different as a group from the rates of systems subject to rate regulation." Second Reconsideration ¶ 28. The cable petitioners think this shows that the rate regulations are not tailored "to the extent of any problem of monopoly pricing." Cable Petitioners Rate Brief at 52. There is, they say, a "mismatch" between the problem and the solution. *Id.* at 53. The cable petitioners make a similar argument based upon the observation that for large systems (5,000 or more subscribers) the average rate is no greater among the regulated than among their unregulated counterparts. In the opinion for the court written by Judge Ginsburg, we explain in detail why the Commission's treatment of the data for low penetration and large systems was neither arbitrary and capricious nor in violation of the 1992 Cable Act. For the reasons discussed there, we also conclude here that the Commission's treatment of those data does not raise any First Amendment concerns. Because regulated large systems and low penetration systems may, as the FCC reasonably concluded, have significant market power and therefore charge supracompetitive rates, and because the Commission established the cost-of-service option as a protective safety-valve for individual systems, there was no mismatch between the problem and the Commission's solution.

[11] The cable petitioners do not claim that the Commission should have determined the actual effects on speech that its rate regulations will cause. While the plurality opinion in *Turner Broadcasting*, 114 S. Ct. at 2472, required the district court to make such findings on remand, petitioners' failure to raise the point in this court or before the Commission renders it unnecessary for us to consider it.

Government is vigorously promoting the provision of video service through telephone-company wires (*e.g.*, through video dialtone service)." Cable Petitioners Rate Brief at 47 n.38. In the meantime, the Commission's benchmark establishes a level above which rates are presumed unreasonable.[12] If any operator believes that it would be justified in charging higher rates, there is a safety valve: the operator may invoke the cost-of-service option. This ensures that every cable operator will be able to recover its reasonable costs and earn an 11.25 percent rate of return on investment. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service*, Report and Order and Further Notice of Proposed Rulemaking, 9 F.C.C.R. 4527, 4612 ¶ 147 (1994). While cost-of-service proceedings will cause operators to incur expenses, this does not render the regulations more restrictive than necessary. The obvious alternative to the Commission's system—holding a cost-of-service proceeding for each regulated cable system—would also cause operators to incur expenses and would in any event be unworkable in light of administrative burdens such a scheme would entail. Rate Order ¶ 392.[13]

* * *

[12] Cable petitioners complain that in revising its initial competitive differential from 10 percent to 17 percent, the Commission employed guesswork and made a number of arbitrary assumptions. Our separate rate opinion fully addresses this complaint. *See* opinion of Ginsburg, J., at 6–16. Suffice it to say that in formulating the revised competitive differential, the Commission gave the greatest weight to the data from overbuilds and that it adequately explained why it did not give equal weight to the other two types of systems not subject to rate regulation under the 1992 Cable Act. *See* Second Reconsideration ¶¶ 29–30, 95–101. The statute itself only requires the Commission to "take into account" or "consider" the rates of systems subject to "effective competition." 47 U.S.C. §§ 543(b)(2)(C), 543(c)(2).

[13] Because we do not believe the rate regulations raise any "grave" constitutional question, we do not decide whether the

The cable rate regulations are subject to intermediate scrutiny under the First Amendment and are not unconstitutional. The government has demonstrated a substantial interest in reducing cable rates and the Commission's regulations issued pursuant to section 3 of the 1992 Cable Act are narrowly tailored to meet that interest. To this extent,

The petitions for review are denied.

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presence of such a question should alter the usual deference paid to the Commission's construction of a statute it administers.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge:* In these consolidated appeals from orders of the Federal Communication Commission implementing the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.) (the "1992 Cable Act"), this opinion addresses challenges to the Commission's rules by a number of cable operators (the "cable petitioners") and several cities ("the Cities") as well as separate challenges by Armstrong Holdings, Inc. ("Armstrong") and the Small Cable Business Association ("Association").[1] The Commission promulgated the rules under § 3 of the 1992 Cable Act, 47 U.S.C. § 543 (Supp. IV 1992), which generally addresses "rate regulation."

In essence, the cable petitioners contend that the Commission's rules carry regulation too far by targeting categories of cable operators and services that Congress intended to spare from the 1992 Cable Act's rate regime. The Cities, in contrast, primarily contend that the Commission's rules unduly *restrict* cable regulation by limiting local government supervision of the cable industry. Armstrong and the Associa-

[1] The "cable petitioners" refers to petitioners Armstrong Holdings, Inc.; Atlanta Cable Partners, L.P.; Benchmark Communications, L.P.; Blade Communications, Inc.; Cable Telecommunications Association; Cablevision Industries Corporation; Century Communications Corporation; Clinton Cable, L.P.; Coalition of Small System Operators; Columbia Associates, L.P.; Comcast Cable Communications, Inc.; Continental Cablevision, Inc.; Cox Cable Communications, Inc.; C–TEC Cable Systems, Inc.; Daniels Cablevision, Inc.; Douglas Communications Corp. II; Falcon Holding Group, L.P.; Georgia Cable Partners; Greater Media, Inc.; Harron Communications Corp.; Horizon Cable I, L.P.; McDonald Investment Company, Inc.; National Cable Television Association, Inc.; Newhouse Broadcasting Corporation; Prime Cable Corp.; TeleCable Corporation; Time Warner Entertainment Company, L.P.; United Video Cablevision, Inc.; Western Communications; and Wometco Cable Corp. The "Cities" refers to petitioners Austin, Texas; Dayton, Ohio; Dubuque, Iowa; King County, Washington; Miami Valley Cable Council; Montgomery County, Maryland; St. Louis, Missouri; and Wadsworth, Ohio.

tion raise concerns relating to the impact of the rate regulations on single tier operators and the Commission's compliance with the Small Business Act [2] and the Regulatory Flexibility Act.[3]

We conclude that the Commission's rules misconstrue or misapply the 1992 Cable Act in four ways. First, the Commission construed the term "effective competition" too narrowly, contrary to the definition adopted by Congress. Second, the Commission erred in concluding that the requirement for a uniform rate structure applies to all systems, including those facing effective competition and not otherwise subject to rate regulation under the statute. Third, the Commission's conclusion that the statute's tier buy-through provision applies to systems subject to effective competition conflicts with the structure and the language of the statute. Fourth, the Commission exceeded its authority by requiring franchising authorities to fund rate regulations out of franchise fees. The additional challenges by the cable petitioners and the Cities are either meritless or unripe for judicial review. Finally, we conclude that the separate challenges by Armstrong and the Association are not properly before the court.

I.

Challenges to the Commission's Rules. In deciding whether the Commission's rules challenged by the cable petitioners and the cities are permissible, we apply the standard of review set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If Congress has spoken to the particular question at issue, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, on the other hand, Congress has not spoken and the statute is either "silent or ambiguous with

[2] 15 U.S.C. §§ 631–656 (1988).

[3] 5 U.S.C. §§ 601–612 (1988).

respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* Finally, if Congress has expressly delegated authority to the agency to fill a particular gap in the statute, we must affirm the ensuing regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

A. **Structure of Section 543.** Because the rules challenged by the cable petitioners and the Cities involve the Commission's interpretation of § 3 of the 1992 Cable Act, 47 U.S.C. § 543, it is instructive to provide some background on the structure and purpose of this section. Since the advent of cable television, Congress has considered the extent to which the federal and local governments should regulate the evolving medium. Prior to 1984, an amalgam of state, local, and federal regulations governed the cable industry, with most regulation taking place at the local level through the franchise process. *See* H.R. REP. NO. 628, 102d Cong., 2d Sess. 29 (1992) (hereinafter "HOUSE REP."). The Cable Communications Policy Act of 1984, Pub. L. No. 98–549, 98 Stat. 2779 ("1984 Act"), was designed to establish a national cable policy and to facilitate innovation and competition in the cable industry by limiting rate regulation only to those cable systems that did not face "effective competition" as defined by the FCC. *Id.* § 2, 98 Stat. at 2780, 2788–89. Congress anticipated that the emergence of satellite systems and other forms of video programming competition would increasingly exert competitive pressure on cable prices. *See* H.R. REP. No. 934, 98th Cong., 2d Sess. 22 (1984); *see generally* HOUSE REP. at 43–47. The 1984 Act ultimately resulted in the deregulation of cable rates in approximately 97% of franchises in the United States. 1992 Cable Act § 2(a)(1), 47 U.S.C. § 521 note (a)(1). Contrary to Congress' expectation, however, competition from satellites and other video sources did not emerge as quickly as expected, and cable operators began to raise cable prices. By 1992, Congress found that the average monthly cable rate had increased "almost 3 times as much as the Consumer Price Index since rate deregulation." *Id.* Congress concluded that rate regulation was necessary to ensure that cable operators would not exercise "undue market power vis-a-vis video programmers and consumers." *Id.* § 2(b)(5), 47 U.S.C. § 521 note (b)(5).

Nevertheless, in the 1992 Cable Act Congress expressed a clear preference for competition rather than rate regulation. In the legislative findings accompanying the 1992 Cable Act, Congress stated that it wished (1) to "promote the availability to the public of a diversity of views and information . . . , " (2) to "rely on the marketplace, to the maximum extent feasible, to achieve that availability," and (3) "where cable television systems are not subject to effective competition, [to] ensure that consumer interests are protected in the receipt of cable service." *Id.* § 2(b)(1), (2) & (4), 47 U.S.C. § 521 note (b)(1), (2) & (4). Congress thus looked first to the marketplace as the source of rate discipline, and only secondarily to government regulation.

The "rate regulation" section of the statute, 47 U.S.C. § 543, bears out this emphasis on competition. In addition to prohibiting the Commission, states, and local governments from regulating rates other than as provided in the statute, *id.* § 543(a)(1), Congress expressly exempted the rates of all systems facing "effective competition" from regulation by the Commission or franchising authorities "under this section." *Id.* § 543(a)(2). For systems not facing "effective competition," local franchising authorities (and in certain circumstances, the Commission) would regulate rates for the basic service tier under § 543(b) [4] and the Commission would regu-

[4] The "basic service tier" is the tier of programming that includes the following: all of the signals carried in fulfillment of the "must-carry" requirements of 47 U.S.C. §§ 534, 535; any public, educational and governmental access ("PEG") channels required by the franchising authority; any television broadcast signals provided by the cable operator except signals that are secondarily transmitted by a satellite carrier beyond the local service area; and any other

late cable programming rates under § 543(c).[5] *Id.* Congress also adopted, among other provisions, a requirement that cable operators offer a uniform rate structure throughout a franchise area, 47 U.S.C. § 543(d), and a prohibition on "negative option billing," namely, "charg[ing] a subscriber for services that the subscriber has not affirmatively requested by name." *Id.* § 543(f).

With this policy and structure in mind, we turn to petitioners' challenges to the Commission's rules. In deciding whether the Commission's interpretations comport with the 1992 Cable Act, we consider "the language and design of the statute as a whole," *American Scholastic TV Programming v. FCC,* 46 F.3d 1173, 1177 (D.C. Cir. 1995) (quoting *Fort Stewart Schools v. FLRA,* 495 U.S. 641, 645 (1990)), recognizing that "congressional intent can be understood only in light of the context in which Congress enacted a statute and of the policies underlying its enactment." *Tataranowicz v. Sullivan,* 959 F.2d 268, 276 (D.C. Cir. 1992).

B. Cable petitioners' challenges.

1. Redefinition of Effective Competition. Section 543(*l*)(1) defines three types of systems that are subject to "effective competition" and therefore exempt from the Commission's rate-setting scheme: low-penetration systems, overbuild systems, and municipal systems. 47 U.S.C. § 543(*l*)(1). Under the statute, a system qualifies as an overbuild if its franchise area is—

> (i) served by at least two unaffiliated multichannel video programming distributors each of which offers compara-

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programming that the cable operator chooses to provide. *Id.* § 543(b)(7).

[5] 47 U.S.C. § 543(*l*)(2) provides:

> The term "cable programming service" means any video programming provided over a cable system, regardless of service tier, . . . other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.

> ble video programming to at least 50 percent of the households in the franchise area; and
>
> (ii) the number of households subscribing to programming services offered by multichannel video programming distributors [6] other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area....

Id. § 543(*l*)(1)(B).

In the challenged rulemaking implementing § 543(*l*)(1), the Commission concluded that in determining whether 15% of households in the franchise area subscribe to cable services for purposes of § 543(*l*)(1)(B)(ii), "only those multichannel video programming distributors that offer programming to at least 50 percent of the households in the franchise area should be included...." *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 F.C.C.R. 5631, 5664–65 (1993) ("*Rate Order*"); *see also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Third Order on Reconsideration, 9 F.C.C.R. 4316, 4321 (1994) ("*Third Reconsideration*"). The Commission reasoned that inclusion of other, non-ubiquitous cable systems in calculating the 15% subscribership would cause anomalous results:

> [Such an approach] would permit a cable company to escape rate regulation even if it faced only a single, ineffective competitor in a majority of its territory, along with a variety of niche competitors to whom it would not necessarily be compelled to provide a competitive response and to whom few of its customers could turn for a

[6] 47 U.S.C. § 522(12) provides:

> The term "multichannel video programming distributor" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.

> competitive alternative. Moreover, in light of the almost universal "offering" of multichannel satellite service, [petitioners'] proposal would make the 15% actual subscribership test the sole determinative factor in almost all situations, rendering [47 U.S.C. § 543(*l*)(1)(B)(i)] superfluous.

Third Reconsideration, 9 F.C.C.R. at 4321.

We agree with the cable petitioners that the Commission's redefinition of overbuilds, although theoretically sound, conflicts with the plain language of the statute. The two overbuild criteria operate independently, and Congress did not limit the 15% threshold in § 543(*l*)(1)(B)(ii) to those cable systems that satisfy § 543(*l*)(1)(B)(i). By its plain terms, the 1992 Cable Act requires the Commission to include the customers of "multichannel video programming distributors other than the largest" in making the 15% subscribership calculation. The statute does not refer to "multichannel video programming distributors mentioned in § 543(*l*)(1)(B)(i) other than the largest," or "*such* multichannel programming distributors other than the largest;" it does not limit in any way the multichannel video programming distributors to be considered in aggregating subscribership. Nor was Congress blind to the existence of satellite providers. Had Congress intended to disqualify as overbuilds those systems that faced only a satellite competitor in at least 50% of their franchise area, it could have done so expressly. Instead, Congress explicitly listed satellite providers among the "multichannel video programming distributors" to be considered in calculating both the 50% and 15% figures. *See* 47 U.S.C. § 522(12). Consequently, the Commission erred by narrowing the overbuild definition of "effective competition" enacted by Congress. *See Chevron*, 467 U.S. at 842–43.[7]

[7] The Congressional committee reports cited in the Commission's brief offer no guidance on the interpretation of the overbuild definition. *See* H.R. CONF. REP. No. 862, 102d Cong., 2d Sess. 62 (1992) (hereinafter "CONF. REP."); HOUSE REP. at 89. As the Commission noted in the *Rate Order*, because of Congress's simplifying assumption that systems in most franchise areas will face only

The Commission does not contend that petitioners' interpretation would lead to "absurd results." *Cf. American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1270 (D.C. Cir. 1994) (quoting *Chemical Manufacturers Ass'n v. Natural Resources Def. Council, Inc.*, 470 U.S. 116, 126 (1985)). Rather, it maintains that its interpretation better advances the goals of the 1992 Cable Act. Had Congress not provided "a precise definition . . . for the exact term the Commission now seeks to redefine," *ACLU*, 823 F.2d at 1568, the Commission's interpretation might well be entitled to deference. In the face of a clear statutory definition, however, there is no occasion for deference. *See Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989); *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986); *Chevron*, 467 U.S. at 842–843. Because it conflicts with the clear language of the 1992 Cable Act, the Commission's attempt to recast the overbuild definition for effective competition is invalid.

2. Uniform rate structure. Section 543(d) provides:

> A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system.

47 U.S.C. § 543(d). The Commission initially determined that the focus of this "uniform rate structure" provision "is properly on regulated systems in regulated markets," *i.e.*, systems that do not face effective competition as defined by the 1992 Cable Act. *Rate Order*, 8 F.C.C.R. at 5896. Although concluding that the language of the statute "does not provide a specific answer" to whether the rate structure provision applies to competitive systems, the Commission decided that exempting such systems comports with "[t]he

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one competing system offering multichannel video programming, "[n]either report addresses the specific issue confronting us here: how to measure the subscribership if there is more than one competitive multichannel video programming distributor in the franchise area." 8 F.C.C.R. at 5664 n.116.

general thrust" of the 1992 Cable Act, which is to decrease regulation as markets grow more competitive. *Id.*[8]

Upon reconsideration, however, the Commission decided that the uniform rate structure provision applies not only to regulated systems, but also to systems subject to effective competition and otherwise exempt from rate regulation under the 1992 Cable Act. *Third Reconsideration*, 9 F.C.C.R. at 4327. The Commission reasoned that the harms targeted by the uniform rate provision—"charging different subscribers different rates with no economic justification and unfairly undercutting competitors' prices"—exist equally in areas where "effective competition," as defined by the 1992 Cable Act, exists. *Id.* To exempt such operators from the uniform rate requirement, the Commission concluded, "would not only permit the charging of noncompetitive rates to consumers that are unprotected by either rate regulation or competitive pressure on rates, but also stifle the expansion of existing, especially nascent, competition." *Id.*

As petitioners argue, the Commission's interpretation of the uniform rate structure provision conflicts with the plain language, structure, and legislative purpose of the 1992 Cable Act. Application of the uniform rate provision to competitive systems violates 47 U.S.C. § 543(a)(2), which prohibits the Commission and franchising authorities from utilizing their rate regulation authority under the 1992 Cable Act to regulate the rates charged by cable systems facing "effective competition."[9] The fact that § 543(a)(2) does not specifically

[8] Contrary to the cable petitioners' suggestion, the Commission based its initial decision not to apply the uniform rate structure provision to competitive systems on the "general thrust" of the 1992 Cable Act, rather than on a conclusion that § 543(a)(2) expressly governed the rate structure provision. Thus, although the Commission did, on reconsideration, change its ultimate conclusion as to the applicability of the uniform rate provision to competitive systems, it did not, as petitioners suggest, reverse itself as to whether § 543(a)(2) governs.

[9] 47 U.S.C. § 543(a)(2) provides:

mention the uniform rate structure provision does not change this conclusion. The subsection exempts competitive systems not only from the regulation of basic and cable programming rates under § 543(b) & (c), but from any rate regulation that the Commission or franchising authorities promulgate "under this section [543]." Furthermore, as petitioners point out, the 1992 Cable Act announces a goal of "ensur[ing] that consumer interests are protected in receipt of cable service" where "cable television systems are not subject to effective competition." 47 U.S.C. § 521 note (b)(4). Given so clear a preference for competition, it is hardly surprising that the congressional intent to exempt competitive systems is evidenced as well in the legislative history. *See, e.g.*, SEN. REP. NO. 92, 102d Cong., 1st Sess. 63 (1991) ("Rate regulation is permitted only in the absence of effective competition.").

Section 543(d)'s mandate that cable operators charge uniform rates is clearly a form of rate regulation. Absent a requirement for uniformity throughout a geographic area, a cable operator would be free to charge either such different rates as the market would bear or uniform rates. In either event, the choice would be that of the operator, not the Commission.

Consequently, because § 543(d) regulates rates within the meaning of § 543(a)(2), we conclude that the Commission's uniform rate structure regulation is contrary to the statute insofar as it applies to cable operators subject to "effective

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If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section. If the Commission finds that a cable system is not subject to effective competition—

(A) the rate for the provision of basic cable service shall be subject to regulation . . . in accordance with the regulations prescribed by the Commission under subsection (b) of this section; and

(B) the rates for cable programming services shall be subject to regulation by the Commission under subsection (c) of this section.

competition." By requiring competitive systems to charge uniform rates, the Commission undermines a hallmark purpose of the 1992 Cable Act: to allow market forces to determine the rates charged by cable systems that are subject to "effective competition" as defined by Congress. In other words, where "effective competition" exists, the consumer is left to the wiles of the marketplace; both the language and the purpose of the 1992 Cable Act make clear that the rates charged by such systems are beyond the Commission's regulatory reach. The Commission's arguments highlighting problems with the choice made by Congress are insufficient to overcome this clear evidence of congressional intent.

Having concluded that the uniform rate provision applies only in the absence of "effective competition," we reject petitioners' contention that the Commission acted arbitrarily and capriciously in denying cable operators' request for a "meeting competition" defense to the uniform rate provision where it applies. In the proceedings before the Commission, cable operators had sought authority to negotiate rates on a building-by-building basis with multiple dwelling units in order to match offers made by other multichannel video producers. *Third Reconsideration*, 9 F.C.C.R. at 4325.[10] The Commission concluded that the 1992 Cable Act is "unequivocal in requiring uniformity of rates within a franchise area" and accordingly rejected the cable operators' proposal.

Although, as the cable petitioners point out, courts have recognized "meeting competition" as a justifiable objective in certain contexts, there is no authority requiring a "meeting competition" defense whenever a statute prohibits discrimination in pricing. *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951), upon which petitioners primarily rely, involved the Robinson–Patman Act, which specifically provides a "meeting competition" exception to its price nondiscrimination requirement.

[10] The Commission allowed cable operators to offer nonpredatory bulk discounts to multiple dwelling units as long as they were offered on a uniform basis across the franchise area. *Rate Order*, 8 F.C.C.R. at 5897, 5898.

See id. at 241–243; 15 U.S.C. § 13(b). The decision in *Standard Oil* turned on statutory interpretation and does not stand for the broad proposition, which petitioners now advance, that "meeting competition" is required in any rate nondiscrimination scheme. Moreover, the fact that the Commission has allowed a "meeting competition" defense to the common carrier nondiscrimination provision of the Communications Act, 47 U.S.C. § 202(a), does not mean that a meeting competition defense is required here. As the Commission points out, § 202(a) prohibits only "unjust or unreasonable" rate discrimination; the 1992 Cable Act, in contrast, bars discrimination of any type. *Compare* 47 U.S.C. § 202(a) *with* 47 U.S.C. § 543(d). The Commission's decision to allow a "meeting competition" defense for common carriers but not cable operators is therefore not irrational, but is justified by differences in statutory language. Because the Commission's refusal to allow a "meeting competition" defense comports with the language of the 1992 Cable Act and is not otherwise barred by relevant precedent, petitioners' "meeting competition" challenge fails.

3. **Tier buy-through**. Section 543(b)(8)(A) prohibits cable operators from requiring a "buy-through" of any tier other than the basic tier as a prerequisite for purchase of per program or per channel video programming:

> A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis. A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.

47 U.S.C. § 543(b)(8)(A). The Commission, in its *Third Reconsideration*, concluded that the tier buy-through provision applies not only to regulated systems, but also to systems subject to "effective competition" and thus not subject

to rate regulation under the 1992 Cable Act. 9 F.C.C.R. at 4328; 47 C.F.R. § 76.921.

The Commission's expansive interpretation of the tier buy-through provision is not permissible under the 1992 Cable Act. First, the provision appears within § 543(b), a subsection that generally focuses upon regulating basic tier rates of systems not facing effective competition. *See* 47 U.S.C. § 543(a)(2) ("If . . . a cable system is not subject to effective competition . . . the rates for the provision of basic cable service shall be subject to regulation . . . under [47 U.S.C. § 543(b)]."); 47 U.S.C. § 543(b)(1) ("[R]egulations [promulgated by the Commission to ensure reasonable basic rates] shall be designed to . . . protect[ ] subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged . . . if such cable system were subject to effective competition."). Perhaps more importantly, the tier buy-through provision is inextricably intertwined with the immediately preceding provision, entitled "Components of the basic tier subject to rate regulation," which clearly applies only to systems not subject to effective competition. *See* 47 U.S.C. § 543(b)(7). The text of the tier buy-through provision illustrates the close relationship between these two provisions: it expressly references § 543(b)(7) and provides that only the basic service tier required by that section can be required as a condition of access to per channel programming. That § 543(b)(7) applies only to regulated systems is made clear by § 543(b)(7)(B), which provides that any additional, optional signals placed upon the basic service tier "shall be provided to subscribers at rates determined under the regulations prescribed by the Commission under this subsection." *Id.* § 543(b)(7)(B). Because this provision applies to any basic tier established pursuant to § 543(b)(7) and clearly states an intention directly to regulate rates, it cannot apply to systems that face effective competition. *See id.* § 543(a)(2). Given the close relationship between § 543(b)(7) and the tier buy-through provision, the Commission's interpretation that the latter applies to systems not facing effective competition fails.

4. Negative Option Billing. The cable petitioners challenge the Commission's conclusion that the statutory prohibition of "negative option billing" does not preempt, but rather may coexist with, state consumer protection laws. Section 543(f) provides:

> A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.

47 U.S.C. § 543(f). The Commission noted in the *Rate Order* that it would "not preclude state and local authorities from adopting rules or taking enforcement action relating to basic services or associated equipment consistent with the implementing rules we adopt and their powers under state law to impose penalties." *Rate Order*, 8 F.C.C.R. at 5905 n.1095. On reconsideration, the Commission clarified that although state and local regulation of negative option billing was permissible, such regulation could not interfere with the right of operators to move programming from one tier to another, to the extent that the Commission had deemed such "tier restructuring" protected by the 1992 Cable Act: "We ... affirm that franchising authorities may not regulate tier restructuring in a manner that is inconsistent with the 1992 Cable Act. In particular, local authorities are precluded from regulating negative option billing to prevent tier restructuring regardless of how the local requirement is characterized." *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, 9 F.C.C.R. 1164, 1209 n.127 (1993) (citation omitted) ("*First Reconsideration*").[11]

[11] The Commission had previously determined that "a change in the mix of channels in a tier, including additions or deletions of channels, will not be subject to the negative option billing provision,

In the *Third Reconsideration*, the Commission further addressed the extent to which state and local authorities should have concurrent jurisdiction over negative option billing. The Commission pointed to § 8 of the 1992 Cable Act, which provides: "Nothing in this title shall be construed to prohibit any State or franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title." 106 Stat. 1484; *see* 47 U.S.C. § 552(c)(1).[12] Concluding that the proscription of negative option billing is a consumer protection measure rather than rate regulation, the Commission decided that state and local regulation of negative option billing is not barred by 47 U.S.C. § 543(a)(1), but rather is "concurrent with the Commission's jurisdiction to regulate negative option billing under the Communications Act." *Third Reconsideration*, 9 F.C.C.R. at 4360–4361. Under the Commission's interpretation, state and local governments may enforce their negative option billing laws and other consumer protection regulations so long as the enforcement does not "approach[ ] actual regulation of 'rates for the provision o[f] cable service' " by frustrating the rate scheme designed by the Com-

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unless [it] change[s] the fundamental nature of the tier. . . . [O]perators need this flexibility to modify and upgrade their offerings in response to marketplace changes." *Rate Order*, 8 F.C.C.R. at 5906. If the Commission had allowed the blanket application of state and local negative option billing laws to all tier changes implemented by cable operators, local authorities could, in theory, take action against cable operators for making even minor modifications unless the consumer affirmatively requested such changes.

[12] In the codified version of this subsection, the word "subsection" appears in place of the word "title." *See* 47 U.S.C. § 552(c)(1) (Supp. IV 1992); *see also* 47 U.S.C.A. § 552(c)(1) (West Supp. 1994). The United States Code Service version, like the Statutes at Large, uses the term "title." 47 U.S.C.S. § 552(c)(1). We follow the general rule that in the event of a conflict between the Statutes at Large and the United States Code, the language in the Statutes at Large controls. *See United States v. Welden*, 377 U.S. 95, 98 n.4 (1964).

mission.[13]

The cable petitioners contend that state laws prohibiting negative option billing are preempted by the 1992 Cable Act because they amount to prohibited rate regulation and conflict with the Commission's overall rate regulation scheme. *See* 47 U.S.C. § 543(a)(1). They also maintain that the Commission changed course without explanation by stating in its *First Reconsideration* that the federal rate scheme would preempt all state negative option billing laws that implicate re-tiering arrangements, but later determining that state and local governments have full concurrent jurisdiction over negative option billing. Because of the Commission's alleged change of course, petitioners contend that the concurrent jurisdiction decision should have, if anything, only prospective effect because, after the *First Reconsideration*, cable operators moved channels between tiers in reliance on the Commission's statement that such re-tiering would be protected from prosecution under state consumer protection laws.

[13] On November 18, 1994, the Commission issued its *Sixth Reconsideration*, which elaborated the circumstances in which state and local negative option billing regulations might "approach" rate regulation and therefore be preempted by the 1992 Cable Act. *Implementation of Sections of the Cable Television and Consumer Protection Act of 1992*, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, 10 F.C.C.R. 1226 (1994) ("*Sixth Reconsideration*"). The Commission concluded that when "there is an actual conflict between federal and state law or where state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress, the state law is preempted." *Id.* at 1265. If, for example, a state consumer protection law would "require affirmative consent from subscribers before passing through external costs and inflation adjustments as permitted by" the price cap rules, the law "would undermine the federal regime governing cable rates" and would therefore be impermissible. *Id.* at 1266. Nor could a state bring action against a cable operator for moving channels to a different tier, so long as such re-tiering does not "fundamentally alter the affected tier." *Id.* at 1267.

Although it is unclear whether petitioners are arguing in favor of express preemption, field preemption, or conflict preemption,[14] we are unpersuaded that Congress preempted state negative option billing laws either expressly or through occupation of the field. The cable petitioners concede that Congress did not intend to "preempt the field" of consumer protection in the cable industry. Nor does the 1992 Cable Act explicitly prohibit the states from enforcing negative option billing regulations. Although § 543(a)(1) precludes state regulation of "rates," the Commission has interpreted the prohibition of negative option billing as a consumer protection provision rather than rate regulation. *Third Reconsideration*, 9 F.C.C.R. at 4361. Because the prohibition against negative option billing is directed entirely at the terms of purchase and sale other than rates, the Commission's interpretation is reasonable. That the negative option provision is not "rate regulation" is further supported by the fact that it applies both to the basic and cable programming

[14] As the court observed in *Jackson v. Culinary School of Washington, Ltd.*, 27 F.3d 573 (D.C. Cir. 1994), the Supreme Court has defined three ways in which federal laws and regulations preempt state and local laws:

> First, Congress may preempt state law explicitly in the text of its statute ("express preemption"). Preemption is fundamentally a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is a simple one. Second, in the absence of express statutory language, Congress may preempt state regulation of a field that it intended the federal government to occupy exclusively ("field preemption"). Third, even when Congress has apparently left room for state regulation in the field, state law is preempted to the extent that it actually conflicts with federal law ("conflict preemption"). The Supreme Court has found an actual conflict where "compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce," and where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 580 (internal citations omitted).

tiers and to premium channels and a la carte programs, which are exempt from the "rate regulation" provisions of the 1992 Cable Act.[15]

The cable petitioners maintain, however, that even if § 543(f) does not expressly exempt state and local negative option billing laws, it preempts those laws insofar as they prohibit activities that are permissible under the 1992 Cable Act. We decline to reach the merits of this aspect of petitioners' preemption argument because it is not ripe for judicial review. The Commission's statement, in the abstract, that the 1992 Cable Act may or may not preempt state laws depending on whether they "approach" rate regulation is not reviewable final agency action.[16] *See Alascom, Inc. v. FCC*, 727 F.2d 1212, 1219 (D.C. Cir. 1984); *see also FTC v. Standard Oil Co. of California*, 449 U.S. 232, 241 (1981) (agency action must be a "definitive statement of position"); *National Ass'n of Regulatory Utility Commissioners v. Department of Energy*, 851 F.2d 1424, 1428–29 (D.C. Cir. 1988) ("*NARUC*").

In addition, unlike "pure legal" questions, which are presumptively reviewable, *see Abbott Laboratories v. Gardner*,

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[15] *See* CONF. REP. at 65 (provision "ensures that cable operators will not be able to charge customers for tiers or packages of programming services or equipment that they do not affirmatively request as well as individually-priced programs or channels"); HOUSE REP. at 79 (noting that services offered on a per-programming, per-channel, or pay-per-view basis are not subject to rate regulation).

[16] Indeed, after the *Sixth Reconsideration* it is evident that the Commission's preemption policy has not yet "crystallized" and that both the court and the agency would benefit from having the question presented in a more concrete form. *See Eagle–Picher*, 759 F.2d at 915; *NARUC*, 851 F.2d at 1428–29 (quoting *State Farm Mutual Auto. Ins. Co. v. Dole*, 802 F.2d 474, 479 (D.C. Cir. 1986)). The Commission stated in the *Sixth Reconsideration* that it could not determine, in the abstract, whether the 1992 Cable Act would preempt state laws interfering with a cable operator's ability to re-tier. *See Sixth Reconsideration*, 10 F.C.C.R. at 1267 ("It is not possible to provide a blanket response . . . in the absence of a specific set of facts to evaluate.").

387 U.S. 136, 149 (1967), the issue of whether the 1992 Cable Act preempts state negative option billing laws involves a host of factual questions peculiar to the state law at issue in each case. *See Alascom*, 727 F.2d at 1219–20; *compare Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 201 (1983). State laws will vary in their terms as well as their application. Certain state negative option billing laws may interfere with the Commission's rate scheme and therefore "approach rate regulation" while others, appearing similar on their face, may have been narrowly interpreted, thereby avoiding any potential conflict with the 1992 Cable Act. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 529 (1977) (determining whether state statute is consistent with federal statute "requires [the court] to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written"). As the court stated in *Alascom*, "whether a state regulation unavoidably conflicts with national interests is an issue incapable of resolution in the abstract." 727 F.2d at 1220. Similarly, whether state law "approaches" rate regulation is a question that can only be decided after a review of the language and scope of the state statute at issue.[17]

Even so, while these considerations weigh against immediate review of petitioners' preemption argument, we would grant judicial review if "the hardship to the parties of withholding court consideration" were more weighty still. *Abbott Laboratories*, 387 U.S. at 148–49; *see also Consolidated Rail Corp. v. United States*, 896 F.2d 574, 577 (D.C. Cir. 1990).

[17] Although prosecutions under state consumer protection laws will generally proceed in the courts (or possibly through state administrative proceedings if such exist), rather than before the Commission, the judicial forum nonetheless can afford the Commission an opportunity to develop its preemption policy in a concrete way in the context of a particular state proceeding. In *Time Warner Cable v. Doyle*, (No. 94–1894) (W.D. Wis.), for example, the Commission, at the request of the court, submitted an *amicus curiae* brief, which concluded that Wisconsin's enforcement action would not undermine the federal cable rules and could therefore proceed against the cable operator.

Although the cable petitioners point to harm arising from the burden of lawsuits arising under different state laws, the Commission has made clear that it plans to preempt those state negative option billing laws that interfere with any tier changes that do not "fundamentally alter the affected tier." *Sixth Reconsideration*, 10 F.C.C.R. at 1267.[18] To the extent that changes fundamentally alter a tier, the Commission has repeatedly indicated that such changes will violate the negative option billing provision of the 1992 Cable Act. *See Rate Order*, 8 F.C.C.R. at 5908 ("restructuring will be subject to the negative option billing provision, if the restructuring effects a fundamental change in the nature of the service subscribers receive"); *Sixth Reconsideration*, 20 F.C.C.R. at 1264; *cf. Third Reconsideration*, 9 F.C.C.R. at 1209 ("operators may engage in *revenue neutral* tier restructuring without violating the negative option billing procedure") (emphasis added). Hence, because the Commission's policy protects cable operators from liability under state negative option billing laws unless their actions are also inconsistent with the negative option provision of the 1992 Cable Act, the Commission's preemption decision does not impose a hardship on operators considering programming changes. *Compare Reno v. Catholic Social Services, Inc.*, 113 S. Ct. 2485 (1993). Furthermore, a general pronouncement by this court on the validity of the Commission's as yet unapplied preemption policy can at best provide limited assistance to reviewing courts in deciding the extent to which a party's conduct may entail liability under a state law; in any event, our decision today would not be binding on other courts reviewing the question of whether the 1992 Cable Act preempts application of a particular state law to a particular defendant. In the

[18] In light of this language in the *Sixth Reconsideration*, the cable petitioners' argument that the Commission's preemption position constitutes a reversal of its earlier position must be rejected. *Compare First Reconsideration*, 9 F.C.C.R. at 1167 n.127 ("franchising authorities may not regulate tier restructuring in a manner that is inconsistent with the 1992 Cable Act"); *with Sixth Reconsideration*, 10 F.C.C.R. at 1267 (state cannot prosecute re-tiering that does not "fundamentally alter the affected tier").